Bank Bumiputra (M) Bhd v Mohd Ibrahim bin Salleh

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22-104 OF 1998(1)
ABDUL MALIK ISHAK J
19 APRIL 1999

Civil Procedure *— Judgment and orders — Judgment in default — Application to set aside — Defence to counterclaim filed out of time — No application to enlarge time — Plaintiff must explain delay and show defence on merits — Change of solicitors — Whether solicitors have authority to enter judgment — Whether judgment in default entered regularly*

Evidence *— Judicial notice — Power failure at courts — Handwritten notation on notice of change of solicitors due to power failure — Whether scope of judicial notice closed*

Legal Profession *— Practice of law — Unqualified solicitor — Failure of solicitor to obtain practising certificate — Whether proceedings invalidated*

The plaintiff granted to Silver Touch Sdn Bhd ('the borrower') two overdraft facilities. In consideration of the overdraft facilities, the first, second and third defendants ('the defendants') executed a letter of guarantee, and the first defendant executed a letter of set-off. In default of the facilities granted, the plaintiff commenced the present proceedings against the defendants. The defendants filed and served their statement of defence which contains a counterclaim of the first defendant. On 29 July 1998, the first defendant's solicitors filed the draft judgment in default ('JID') against the plaintiff. The plaintiff filed the reply and defence to the counterclaim on 20 August 1998 without a court order to extend time. On 16 September 1998, Messrs Khalid Shah & Co filed a notice of change of solicitors dated 23 September 1998. Thereafter, on 18 September 1998, Messrs Khalid Shah & Co entered JID against the plaintiff on the counterclaim. On 1 October 1998, Messrs Khalid Shah & Co served a judgment in default on the plaintiff's solicitors. A notice of change of solicitors was only served on the plaintiff's solicitors on 5 October 1998. The plaintiff subsequently filed an application in encl 33 to set aside, inter alia, the JID dated 29 July 1998. The senior assistant registrar allowed the plaintiff's application and hence this appeal.

Held, allowing the appeal with costs:

(1) When the judgment in default was entered on 18 September 1998, Messrs Khalid Shah & Co was already on record as solicitors for the first defendant on 16 September 1998 and hence, they had authority to enter the JID (see p 797B).

(2) An extension of time was an issue to be determined by the court. The plaintiff in filing the defence to the counterclaim did so out of time and there was no formal application to enlarge or abridge time (see p 799I). For the plaintiff to set aside the JID, the plaintiff must explain the delay and show a defence on the merits (see p 789C).

Obiter:

(1) The court took judicial notice of the frequency of power failures in the Johor Bahru High Courts. The scope and latitude of judicial notice extend far and wide. It is not closed. When a court takes judicial notice of a fact, it simply means that the court declares that it will find that the fact exists. Thus, applying the court's general knowledge of the courts in Johor Bahru, handwritten notations on the notice of change of solicitors would be done by the relevant officers when electricity supplies were not available. Conclusively on 18 September 1998, Messrs Khalid Shah & Co had the relevant authority to enter the judgment in default of defence as seen in notice of change of solicitors (see pp 797D–E, 798A–C).

(2) Proceedings were not invalidated between one litigant and the opposite party merely by reason of the litigant's solicitor being unqualified, for example by his failure to obtain a proper practising certificate in force. The fact that the solicitor is without a practising certificate should not jeopardise the position of the litigant. Litigants are ordinary citizens who seek redress in courts of law and are not concerned with the legal technicalities that affect the status of their solicitors (see p 800B–C).

[Bahasa Malaysia summary

Plaintif telah memberikan Silver Touch Sdn Bhd ('peminjam') dua kemudahan overdraf. Sebagai balasan untuk kemudahan tersebut, defendan pertama, kedua dan ketiga ('defendan-defendan') telah melaksanakan sepucuk surat jaminan sementara defendan pertama melaksanakan sepucuk surat tolakan. Dengan mengingkari kemudahan yang diberikan, plaintif telah memulakan prosiding ini terhadap defendan-defendan. Defendan-defendan memfail dan menyampaikan pernyataan pembelaan mereka yang mengandungi tuntutan balas defendan pertama. Pada 29 Julai 1998, peguamcara defendan pertama memfailkan draf penghakiman ingkar ('JID') terhadap plaintif. Plaintif memfailkan jawapan dan pembelaan kepada tuntutan balas pada 20 Ogos 1998 tanpa perintah mahkamah untuk melanjutkan masa. Pada 16 September 1998, Tetuan Khalid Shah & Co memfailkan notis tukaran peguamcara bertarikh 23 September 1998. Selepas itu, pada 18 September 1998, Messrs Khalid Shah & Co memasukkan JID terhadap plaintif atas tuntutan balas. Pada 1 Oktober 1998, Tetuan Khalid Shah & Co menyampaikan suatu penghakiman ingkar kepada peguamcara plaintif. Suatu notis tukaran peguamcara hanya disampaikan kepada peguamcara plaintif pada 5 Oktober 1998. Plaintif kemudiannya memfailkan suatu permohonan dalam lampiran 33 untuk mengetepikan, antara lain, JID bertarikh 29 Julai 1998. Penolong kanan pendaftar telah membenarkan permohonan plaintif; maka rayuan ini dikemukakan.

Diputuskan, membenarkan rayuan dengan kos:

(1) Apabila penghakiman ingkar dimasukkan pada 18 September 1998, Tetuan Khalid Shah & Co telah pun direkodkan sebagai peguamcara untuk pihak defendan pertama pada 16 September 1998 dan justeru itu, mereka telah diberi kuasa untuk memasukkan JID (lihat ms 797B).

(2) Perlanjutan masa merupakan satu isu untuk diputuskan oleh mahkamah. Plaintif dalam memfailkan pembelaan kepada tuntutan balas telah berbuat demikian di luar masa dan tidak terdapat permohonan rasmi untuk melanjutkan masa (lihat ms 799I). Bagi membolehkan plaintif berjaya mengetepikan JID, plaintif mestilah menjelaskan kelewatan dan menunjukkan pembelaan atas merit (lihat ms 789C).

Obiter:

(1) Mahkamah telah mengambil notis kehakiman tentang kekerapan kegagalan bekalan kuasa di Mahkamah Tinggi Johor Bahru. Rangkuman dan latitud notis kehakiman adalah luas. Ia tidak tertutup. Apabila mahkamah mengambil notis kehakiman tentang sesuatu fakta, ia cuma bermakna bahawa mahkamah mengisytiharkan ia akan mendapati bahawa fakta itu wujud. Justeru itu, dengan memakai pengetahuan am mahkamah mengenai mahkamah-mahkamah di Johor Bahru, nota-nota secara bertulis mengenai tukaran peguamcara akan dilakukan oleh pegawai yang berkenaan apabila tiadanya bekalan elektrik. Dengan itu pada 18 September 1998, Tetuan Khalid Shah & Co telah diberikuasa untuk memasukkan penghakiman ingkar pembelaan sebagaimana yang kelihatan dalam notis tukaran peguamcara (lihat ms 797D–E, 798A–C).

(2) Prosiding tidak menjadi tak sah di antara suatu pihak litigan dan pihak yang bertentangan semata-mata berdasarkan alasan ketidaklayakan peguamcara litigan, misalnya atas kegagalan beliau untuk memperolehi sijil amalan yang sempurna dan berkuatkuasa. Hakikat bahawa peguamcara tersebut tidak memiliki sijil amalan tidak seharusnya mempengaruhi kedudukan. Litigan-litigan merupakan rakyat biasa yang memohon relief di mahkamah undang-undang dan tidak mempedulikan hal teknikal berkenaan undang-undang yang menjejaskan kedudukan peguamcara mereka (lihat ms 800B–C).]

Notes

For notes on judgment in default, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2763–2764.

For notes on judicial notice, see 7 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1449–1467.

For notes on practice of law generally, 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1495–1526.

A **Cases referred to**

Abdul Razak bin Ahmad v Majlis Bandaraya Johor Bahru [1995] 2 MLJ 287

B Dialdas & Co (Pte) Ltd v Sin Sin & Co & Ors [1984] 2 MLJ 223 (refd)

B *Bayley v Thompson* (1834) 2 Cr & M 673 (refd)

Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat [1979] 1 MLJ 23 (refd)

Burns v Edman [1970] 2 QB 541, [1970] 1 All ER 886 (refd)

Clayton v Hardwicke Colliery Co Ltd (1915) 85 LJKB 292 (refd)

Commercial Banking Co of Sydney Ltd v Mann [1961] AC 1 (refd)

C *Commonwealth Shipping Representative v P & O Branch Service* [1923] AC 191 (refd)

Evans v Bartlam [1937] AC 473 (refd)

Foley v Hill (1848) 2 HL Cas 28 (refd)

Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp

D *Bhd* [1994] 1 MLJ 312 (refd)

Hill v Mills (1834) 2 Dowl 696 (refd)

Hilleary v Hungate (1834) 3 Dowl 56 (refd)

Hodgson & Ross, Re (1835) 3 Ad & El 224 (refd)

Huth v Huth [1915] 3 KB 32 (refd)

L Oppenheim & Co v Mahomed Haneef [1922] 1 AC 482 (refd)

E *Lipkin Gorman v Karpnale Ltd* [1991] 3 WLR 10 (refd)

London City and Midland Bank Ltd v Gordon [1903] AC 240 (refd)

Nye v Niblett [1918] 1 KB 23 (refd)

Oxford Poor Rate Case, Re (1857) 8 E & B 184 (refd)

R v Luffe (1807) 8 East 193 (refd)

F *R v Sisk, Sisk v Foley* (1901) 35 NBR 560 (refd)

Rechik Kadir & Anor v Mohamed Shah Senusi [1997] 1 CLJ Supp 508 (refd)

Richards v Bostock (1914) 31 TLR 70 (refd)

Ross & Hodgson, Re (1835) 4 LJKB 264 (refd)

Shahinuddin bin Shariff v Mohd Amin bin Hasbollah [1998] 3 MLJ 693

G (refd)

Shaw, Savill & Albion Co Ltd v Timaru Harbour Board (1888) 6 NZLR 456 (refd)

Simpol bin Ahmad v Koh Bee Tin & Anor [1978] 1 MLJ 10 (refd)

Sparling v Brereton (1866) LR 2 Eq 64 (refd)

H *Theaker v Richardson* [1962] 1 All ER 229, [1962] 1 WLR 151 (refd)

Yukilon Manufacturing Sdn Bhd & Anor v Dato' Wong Gek Meng & Ors (No 2) [1998] 5 MLJ 1 (refd)

Legislation referred to

I Legal Profession Act 1976 ss 36, 37(2), 40, 85

Rules of the High Court 1980 O 3 r 5(1), O 18 r 3(2), O 18 r 20, O 19 r 2(1), O 19 r 8

John Looi (*Chan Chiew Fai* with him) (*Chor Pee Anwarul & Co*) for the plaintiff. A

Syed Ahmad Helmy Dahlan (*KB Rajah* with him) (*KB Rajah & Co*) for the first defendant.

Abdul Malik Ishak J: B

Background facts

At all material times, Silver Touch Sdn Bhd (in receivership and under liquidation) was a customer of the plaintiff, a bank. By a facility agreement made between the plaintiff and Silver Touch Sdn Bhd ('borrower'), the terms of which are set out in the letters of offer dated 16 May 1992 and 8 July 1994 and duly accepted by the borrower, the plaintiff granted to the borrower overdraft facilities of RM1.0m and RM1.038m respectively. It was a term of the facility agreement that all charges and legal expenses including the fees of the plaintiff's solicitors were on the basis of a solicitor and client and shall be borne by the borrower. On or about 31 October 1996, the borrower defaulted in paying monies due under the facility agreement comprising of the entire outstanding sum of RM1,625,010.03 being principal and RM17,932.66 being accrued interest which became immediately due and payable. C D

Calculation wise, as at 27 October 1997, the total sum of RM1,746, 988.15 together with a further interest thereon at the rate of 4% above the plaintiff 's base lending rate became due and outstanding from the borrower to the plaintiff under the facility agreement (hereinafter referred to as the 'said outstanding sum as at 27 October 1997'). By letter dated 29 October 1997, the plaintiff's solicitors Messrs Chor Pee Anwarul & Co demanded payment of the said outstanding sum as at 27 October 1997 but the borrower played possum and throughout the borrower had failed, neglected and refused to pay the sum demanded or any part thereof. E F

Now, in consideration of the plaintiff making available the overdraft facility of RM1.0 million, and by the letter of guarantee dated 2 December 1992, the first, second and third defendants agreed to jointly and severally guarantee the repayment of RM1.0m which became due and payable by the borrower to the plaintiff under the facility agreement including all costs and charges and expenses. Since the borrower had defaulted, the plaintiff's solicitors Messrs Chor Pee Anwarul & Company wrote a letter of demand dated 29 October 1997 addressed to the first, second and third defendants and demanded the repayment of the said outstanding sum as at 27 October 1997, but all the three defendants jointly failed, neglected and refused to pay the same. G H

The liability of the first defendant did not end there. As security for the overdraft facility of RM1.038 million, the first defendant executed the letter of set-off dated 9 July 1994 ('the said letter of set-off') with respect to the first defendant's fixed deposit vide receipt No 01318282 and every renewal thereto. Under the said letter of set-off, the plaintiff was entitled to transfer and set-off any sums standing to the credit of the fixed deposit and apply I

A those sums for the payment of the sums due from the borrower to the plaintiff. Being prudent and pursuant to the said letter of set-off, the plaintiff did, after giving the first defendant due notice, uplift the fixed deposit with the intention of transferring the sums standing to its credit to the borrower's account.

B The uplifting of the fixed deposit belonging to the first defendant by the plaintiff gave rise to interesting consequences. It was said that due to the mistake of the plaintiff, on or about 8 October 1996, the sum of RM1,038,096.85 being the amount of the fixed deposit ('the said amount') was credited into the first defendant's personal account No 01–013–12728–64 instead of the borrower's account No 01–013–12537–46. Naturally, the C first defendant was elated and he then issued three cheques drawn on his personal account:

	Cheque numbers	Amounts in Ringgit Malaysia
(1)	345297	300,000
(2)	345298	460,000
D (3)	345300	296,850

The first defendant cashed the first two cheques and used the third cheque to purchase a banker's cheque No 804152. When the plaintiff realised the mistake which they had made, the plaintiff quickly stopped payment on the banker's cheque No 804152 and commenced the present proceedings E against all the three defendants.

With regards to the first, second and third defendants, the plaintiff claimed for:

(i) the sum of RM1,746,988.15 as at 27 October 1997; and

(ii) interest thereon at the rate of 4% above the plaintiff's base lending rate F from 28 October 1997 to the date of full payment.

In regard to the first defendant, by way of an alternative, the plaintiff claimed for:

(i) the sum of RM1,038,096.85 as money had and received by the first defendant for the first defendant's use and/or as restitution;

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(ii) interest thereon at the rate of 8% per annum from 8 October 1996 to the date of full payment;

(iii) an order that the first defendant do within 14 days deliver the banker's cheque to the plaintiff or to its solicitors; and

H (iv) a declaration that the plaintiff be at liberty to apply the sum of RM296,850 in the suspense account towards the satisfaction of the judgment sums prayed for against the first, second and third defendants.

In any event, as against the first, second and third defendants, the plaintiff sought for:

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(i) costs ; and

(ii) further and or other relief as this honourable court deems fit.

Reverting back to the banker's cheque to the value of RM296,850 vide cheque No 345300 the first defendant still held possession of the banker's cheque. To overcome the problem, the plaintiff placed the banker's cheque in a suspense account maintained by the plaintiff.

In so far as the banker's cheque was concerned, the first defendant made it as part and parcel of his counterclaim. It is this counterclaim that figured prominently in encl 48 of which I have more to say in the later part of this judgment.

The chronology of events leading to encl 48

5 March 1998:	Plaintiff filed the writ of summons together with the statement of claim against all the three defendants as seen in encl 2.
18 June 1998:	Messrs Amin & Associates entered an appearance by filing a memorandum of appearance dated 16 June 1998 for all the three defendants and this can be seen in encl 12.
27 June 1998:	The statement of defence for all the three defendants dated 26 June 1998 was filed as seen in encl 14. That statement of defence contained a counterclaim of the first defendant for the sum of RM296,850 which was in the form of a banker's cheque.
29 June 1998:	The first defendant served his defence and counterclaim.
29 July 1998:	Without giving any notice to the plaintiff's solicitors, the first defendant's solicitors filed the draft judgment in default ('JID') against the plaintiff.
20 August 1998:	Unaware of the draft JID, the plaintiff filed a reply and defence to counterclaim and tried to serve on the first defendant's solicitors but their office was closed.
27 August 1998:	The plaintiff's solicitors wrote to the Bar Council for information on the status quo of Messrs Amin & Associates and was told that it had ceased practice with effect from 15 May 1998.
18 September 1998:	Without filing the notice of change of solicitors or informing the plaintiff's solicitors, Messrs Khalid Shah & Co entered JID against the plaintiff on the counterclaim.
1 October 1998:	Messrs Khalid Shah & Co served a JID dated 29 July 1998 (backdated) on the plaintiff 's solicitors.
5 October 1998:	Messrs Khalid Shah & Co served a notice of change of solicitors dated 23 September 1998 on the plaintiff's solicitors.
28 October 1998:	The plaintiff filed an application in encl 33 to set aside, inter alia, the JID dated 29 July 1998.

21 November 1998:	The senior assistant registrar ('SAR') allowed the plaintiff 's application in encl 33.
24 November 1998:	The first defendant filed a notice of appeal to the judge in chambers dated 24 November 1998 as seen in enclosure 48.

Now, encl 48 relates to an order of the SAR dated 21 November 1998 which set aside not only the JID in encl 26 but also the memorandum of appearance in encl 12 and the statement of defence and counterclaim in encl 14. The basis of the plaintiff's application in encl 33 can be seen in the affidavit in support that was affirmed by Suhadi bin Khalil on 26 October 1998 and filed on 28 October 1998 as seen in encl 31. In encl 33, the plaintiff sought for the following prayers:

(1) (a) the memorandum of appearance dated 16 June 1998 of the defendants;

(b) the statement of defence and counterclaim dated 26 June 1998 for all the defendants;

(c) the judgment in default dated 29 July 1998; and

(d) the writ of seizure and sale No 37–16–98 and its execution; be set aside.

(2) the plaintiff be given leave to file the defence to the counterclaim of the first defendant;

(3) the cost of the application be paid by the first defendant to the plaintiff; and

(4) any other relief which this honourable court deems fit.

It is now trite law that in setting aside the judgment in default, the first step for the court to ascertain would be whether the judgment in default is regular or irregular. Encik Syed Ahmad Helmy Dahlan, learned senior counsel for the first defendant, submitted with zest and gusto that the judgment in default was regularly obtained. Mr John Looi, learned senior counsel for the plaintiff, submitted with equal vigour to the contrary. In *Evans v Bartlam* [1937] AC 473, Lord Atkin at p 480 of his judgment said: '... that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence ...'. In *Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat* [1979] 1 MLJ 23, Raja Azlan Shah, Acting CJ (Malaya) (as his Majesty then was) at p 24 aptly said: '... It is axiomatic that if the judgment is regular, then it is an inflexible rule that there must be an affidavit of merits, that is, an affidavit stating facts showing a defence on the merits ...'. To me, the phrase 'defence on the merits' means a defence which discloses an arguable and triable issue (*B Dialdas & Co (Pte) Ltd v Sin Sin & Co & Ors* [1984] 2 MLJ 223).

The rule in *Evans v Bartlam* must be echoed here. There it was stated that while the Court of Appeal will normally not interfere except on grounds of law with the exercise of the judge's discretion, but if it can be shown that

on other grounds the judge's decision would result in injustice being done, then the Court of Appeal has both the power and the duty to remedy it. Lord Atkin aptly put it at p 480 of the report in these words:

> The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

I need to go to the basics and I have this to say:

(1) in an application for setting aside a judgment in default, the court would have to consider the merits of the case;

(2) where judgment is entered on the failure of a defendant to take any of the procedural steps laid down under the Rules of the High Court 1980 ('RHC'), the court has the absolute discretion — an unfettered one, to set aside the judgment, if necessary, on terms and allow the case to be heard on the merits (*Evans v Bartlam*);

(3) in regard to a regular judgment, *Mallal's Supreme Court Practice* (2nd Ed) Vol 1 at p 84 explains the position in refined language as follows:

> The discretion will only be exercised if the affidavit supporting the application to set aside discloses facts showing a defence on the merits; or for some very sufficient reason: *Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat* [1979] 1 MLJ 23; *Farden v Richter* (1889) 23 QBD 124.

(4) the case of *White v Weston* [1968] 2 QB 647 is a classic example of a case where there is an arguable or triable issue as that case was a case of contributory negligence in a running down action — a defence on the merits means merely to raise an arguable or triable issue. Another example of a defence having an arguable or triable issue can be seen in the case of *Simpol bin Ahmad v Koh Bee Tin & Anor* [1978] 1 MLJ 10, where the respondent there applied for an order that an interlocutory judgment entered in default of appearance and final judgment obtained be set aside on the ground that the interlocutory judgment obtained was nothing more than a nullity, alternatively on the ground that it was irregularly obtained. The judge gave judgment to the respondent and set aside the judgment because the statement of claim was admittedly in error when it described wrongly as to how the accident occurred.

(5) a judgment in default can never be construed as a judgment on the merits (*L Oppenheim & Co v Mahomed Haneef* [1922] 1 AC 482).

Jemuri Serjan CJ (Borneo) speaking from the Supreme Court in *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312, in a long judgment, had this to say of the principles in setting aside a default judgment as seen at pp 321–322 of the report:

> A scrutiny of the case of *Evans v Bartlam*[1937] AC 473; [1937] 2 All ER 654 would show that different Law Lords used different terms but they all seemed to agree that for the defendant to succeed in his application to set aside a default judgment, he must show that the defence had merits that ought to be

tried by the court. In other words, in popular language, the defence was not a sham defence. Lord Atkin was of the view that it was sufficient for the defendant to file an affidavit on merits, meaning that the applicant must produce to the court evidence that he had a prima facie defence (see p 480). Lord Wright, on the other hand, at p 489, was of the view that the primary consideration was whether the defendant had merits to which the court should pay heed, and, if the merits were shown, the court would not, prima facie, desire to let a judgment pass, on which there had been no proper adjudication. If the defendant showed merits, then he clearly showed an issue which the court should try. Lord Russell of Killowen, on his part, reminded the courts not to fail to consider whether any useful purpose could be served by setting aside the judgment and that obviously, no useful purpose would be served if there were no possible defence to the action. In other words, the standard laid down by Lord Russell is not that much lower and that it is sufficient if the defendant can show he has a possible serious defence.

In Malaysia, the tendency of the courts hitherto is to follow the guidelines enunciated in the case of *Evans v Bartlam*, bearing in mind also that this is a House of Lords case while *Saudi Eagle*'s case [1986] 2 Lloyd's Rep 221 is the decision of a Court of Appeal. In Malaysia, we are not bound by the decisions of the House of Lords but the courts always accept those authorities as persuasive authorities which may be followed. Indeed, this court has had occasion to consider the question whether a judgment in default should be set aside under O 13 r 8 and did in fact approve and followed Lord Atkin's dictum. Thus, in *Fira Development Sdn Bhd v Goldwin Sdn Bhd* [1989] 1 MLJ 40, Lee Hun Hoe CJ (Borneo) (as he then was) held that a defence on the merits meant merely raising only an arguable or triable issue, not unlike any O 14 cases and that a judgment in default was not a judgment on the merits. In other words, it was decided in that case that a judgment in default may be set aside if the facts show a defence has merits. *Fira*'s case was followed by Zakaria Yatim J in *PL Construction Sdn Bhd v Abdullah bin Said* [1989] 1 MLJ 60. Again, VC George J in *East Asiatic Co (M) Bhd v Kamanis Sdn Bhd* [1985] 2 MLJ 227 used such expression as 'bona fide reasonable defence' to describe the standard of the defence that must be met for the applicant to succeed in setting aside a default judgment, although he cited no authority for his proposition, and it seemed to us the proposition was redolent of Lord Atkin's dictum. Consistent with the decision of our own courts in the past in dealing with issues such as those under O 13 r 8 and O 19 r 9, the guidelines in *Evans v Bartlam* should be accepted. In our view, in order to succeed in his application under these orders, the applicant must show that he has a defence which has some merits and which the court should try. To use common and plain language, the applicant must show that his defence is not a sham defence but one that is prima facie, raising serious issues as a bona fide reasonable defence that ought to be tried because obviously if the defence is a sham defence, there is no defence and the application must fail. It need hardly be emphasized that in order for the court to arrive at a decision that the defence has merits, it must perforce make a reasoned assessment of the justice of the case by forming a professional view of the probable outcome of the case, but this is stating the obvious. It involves a mental process that goes through the mind of a judge when making a decision in any case, weighing the evidence of a litigant against that of another on the facts alleged by a party against those of the other before finally coming to a decision. At any rate, whether we follow *Saudi Eagle* or *Evans v Bartlam*, both cases only lay down, not rules of law that must be stringently complied with, but merely guidelines to assist a judge in

> the exercise of his discretion. So long as the judge exercises his discretion according to principles of law, the appellate court would hesitate to interfere with the judge's exercise of discretion. It is for the appellants to convince us that this is a proper case for our interference with the learned judge's exercise of his discretion under O 19 r 9.

With these principles in mind, I will now proceed to the heart of the matter. Upon perusal of all the affidavits in support and in opposition to the plaintiff's application to set aside the judgment in default, there was no explanation whatsoever pertaining to the delay of the plaintiff in filing the reply and defence to the counterclaim. Order 18 r 3(2) of the RHC states that a plaintiff on whom a defendant serves a counterclaim must, if he intends to defend it, serve on that defendant a defence to counterclaim. Order 18 r 20 of the RHC states as follows:

> (1) The pleadings in an action are deemed to be closed —
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> (a) at the expiration of 14 days after service of the reply or, if there is no reply but only a defence to counterclaim, after service of the defence to counterclaim; or
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> (b) if neither a reply nor a defence to counterclaim is served, at the expiration of 14 days after service of the defence.
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> (2) The pleadings in an action are deemed to be closed at the time provided by para (1) notwithstanding that any request or order for particulars has been made but has not been complied with at that time.

and the cumulative effect of the provisions simply mean that the plaintiff has to file a defence to counterclaim within 14 days after service of the counterclaim and beyond that period the plaintiff must apply to the court for extension of time as provided under O 3 r 5(1) of the RHC. From the narrative of the facts, it was abundantly clear that the first defendant served his defence and counterclaim to the plaintiff on 29 June 1998. The plaintiff would have 14 days to reply thereafter and that would be on 13 July 1998. On 20 August 1998, the plaintiff filed the reply to the defence and counterclaim without a court order to extend time. Calculated from 13 July 1998, the delay came up to one month eight days. To add insult to injury, the reply to the defence and counterclaim was never served on the first defendant right up to the time the plaintiff filed an application in encl 33. This brings to mind O 19 r 2(1) of the RHC which states that:

> Where the plaintiff's claim against a defendant is for a liquidated demand only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these rules for service of the defence, enter final judgment against that defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any.

and it lays down the procedure for default judgment in lieu of defence to be entered. Order 19 r 8 of the RHC states as follows:

> A defendant who counterclaims against a plaintiff shall be treated for the purposes of rules 2 to 7 as if he were a plaintiff who had made against a defendant the claim made in the counterclaim and, accordingly, where the plaintiff or any other party against whom the counterclaim is made fails to

A serve a defence to counterclaim, those rules shall apply as if the counterclaim were a statement of claim, the defence to counterclaim a defence and the parties making the counterclaim and against whom it is made were plaintiffs and defendants respectively, and as if references to the period fixed by or under these rules for service of the defence were references to the period so fixed for service of the defence to counterclaim.

B and this court must treat the first defendant as if he was a plaintiff in the context of the counterclaim. The time frame formulated under the RHC must be strictly adhered to (*Rechik Kadir & Anor v Mohamed Shah Senusi* [1997] 1 CLJ Supp 508). The length of the delay would certainly be a factor affecting the court's discretion to extend time. In *Rechik Kadir & Anor*, the C delay was for a period of three months. Here, the delay was lesser and as I said it was one month eight days only. Encik Syed Ahmad Helmy Dahlan submitted rather well and he rightly pointed out that since no excuse was given then likewise no indulgence should be accorded to the plaintiff. Now, for the plaintiff to set aside the judgment in default, the plaintiff must explain the delay and show a defence on the merits. But, since the defence D to the counterclaim was invalid for non-compliance with the RHC and there was no formal application under O 3 of the RHC for extension of time, this court must only refer to encls 31 and 43 to ascertain whether there were merits in the defence to the counterclaim. I would be magnanimous and proceed to examine encl 41, an affidavit of the first defendant, that was E affirmed on 9 November 1998 and filed on the same day. The affidavit in encl 41 was quite lengthy and very thorough. I will now reproduce some parts of the affidavit. To begin with, the following paragraphs are germane:

> 3 Sometime on/or about 20 October 1998, my new solicitors Messrs KB F Rajah & Co, filed the notice of change of solicitors and served the same on the relevant parties.
>
> 4 I have been informed by my present solicitors that upon receipt of the said notice of change of solicitors, Mr Terence Lee of Messrs Chor Pee Anwarul & Co rang up Mr KB Rajah of Messrs KB Rajah & Co upon which Mr KB Rajah told Mr Terence Lee to do the necessary on behalf G of his client.
>
> 5 I have been informed that sometime on/or about 26 October 1998 when my solicitors executed on the judgment dated 29 July 1998 at the plaintiff's branch at Johor Bahru Mr John Looi Teh Sung of the plaintiff's solicitors rang up my solicitors Messrs KB Rajah & Co and requested their client ie the 1st defendant to suspend the said writ of seizure and sale H until Wednesday ie 28 October 1998 to which I have been informed that Mr KB Rajah would inform Mr John Looi Teh Sung if his client ie I instructed him to do so. When Mr Rajah rang me that day and passed on this information I instructed him to proceed with the execution.
>
> 6 In the circumstances aforesaid, I crave leave to refer to the order dated 28 October 1998 and the summons in chambers (ex parte) dated I 28 October 1998. I have been advised and verily believe that the said order dated 28 October 1998 is null and void as no notice of the said summons in chambers was given to me or my solicitors on record.

The next germane paragraphs in encl 41 would be:

8 I crave leave to refer to para 3 of the said affidavit. To date the reply and defence to the counterclaim has not been served on any of my former solicitors viz Messrs Khalid Shah & Co or my present solicitors Messrs KB Rajah & Co or even Messrs Amin & Associates.

9 I crave leave to refer to paras 4, 5, 6 and 7 of the said affidavit. All solicitors in the state of Johor would have known of those solicitors without their annual certificate and as a result be without their practising certificates for the year 1998 as a list of those without them was circulated. Now shown to me and marked as exh 'MBS1' is a copy of the circular dated 11 June 1998 by the Johor Bar Committee. I verily believe that the plaintiff could have taken the necessary action when the memorandum of appearance and subsequently the defence and counterclaim was filed and served on the plaintiff's solicitors. I am further advised and verily believe that the issue of the annual certificate and the practising certificate is a matter for the lawyers and their disciplinary bodies and it does not affect my position as party who had obtained a valid and regular judgment under the laws. The letters marked in exhs 'SK 3' and 'SK 5' were written after the draft judgment had been filed in this honourable court.

10 I now crave leave to refer to para 8 of the said affidavit. As far as I was concerned the plaintiff who was represented by solicitors did not file any reply and defence to my counterclaim, if any, within the stipulated period under the Rules of the High Court 1980. As such I instructed En Abdul Khalid Shah bin Mohamad Omar who was at the time with Messrs Amin & Associates, to file the relevant documents to obtain judgment in default of defence in respect of my counterclaim. As a result I have been informed by my former solicitors Messrs Khalid Shah & Co that the draft judgment was filed sometime on/or about 29 July 1998 and when later En Abdul Khalid Shah started to operate on his own under the name and style of Messrs Khalid Shah & Co be extracted the sealed copies of the said order dated 29 July 1998.

11 I am advised and verily believe that the said judgment in default of defence is a regular and valid judgment.

Then it would be the following paragraphs of encl 41:

12 I crave leave to refer to para 9 of the said affidavit. As far as I am concerned my former solicitors Messrs Khalid Shah & Co served their notice of change of solicitors on the plaintiff's solicitors sometime on/or about 2 October 1998. Subsequently my present solicitors Messrs KB Rajah & Co served their notice of change of solicitors on/or about 20 October 1998. However, to date there has been no service of any application by the plaintiff on the said solicitors.

13 I crave leave to refer to para 10 of the said affidavit. As stated above no reply and defence to the counterclaim has been served either on Messrs Khalid Shah & Co or Messrs KB Rajah & Co to date. In any event even if the same has been filed (out of time) it is not valid as it is out of time and leave has to be obtained from the court for doing so. A search by my solicitors shows that it was filed sometime on/or about 20 August 1998 at the High Court Registry which is way out of time under the Rules of the High Court 1980 with no application for leave.

14 I crave leave to refer to para 11 of the said affidavit. The said letters in respect of En Mohd Amin Hasbollah's status do not in any way reflect upon the statement of defence and counterclaim by the first defendant. Further the plaintiff and/or its solicitors did not inform the defendants of the status of their solicitors to enable them to effect the necessary change of solicitors as En Mohd Amin bin Hasbollah did not have a valid sijil annual for the year 1998 and as such did not possess a practising certificate for the said year.

15 I crave leave to refer to para 12 of the said affidavit. Although the plaintiff's solicitors at that time knew that the solicitors for defendants did not have the legal capacity the exhibit marked as 'SK 4' shows that the said solicitors still attempted to serve the said documents on Messrs Amin & Associates. And this was not told to the defendants. Subsequently when Messrs Khalid Shah & Co and later Messrs KB Rajah & Co were appointed solicitors for the defendants no application for summary judgment was served on them.

16 The draft copy of the judgment in default of defence to the counterclaim was filed sometime on/or about 29 July 1998 and extracted sometime on/or about 18 September 1998. It was validly sent to the plaintiff's solicitors to which there was no positive response until 26 October 1998 when execution was levied on the said judgment.

17 I crave leave to refer to para 14 of the said affidavit. The defendants' new solicitors Messrs Khalid Shah & Co filed their notice of change of solicitors sometime on/or about 23 September 1998 and served the same on the plaintiff's solicitors sometime on/or about 2 October 1998. I verily believe that the status of the same could have easily been verified by the Johor Bar Committee.

This would be followed by the following paragraphs of encl 41:

20 I crave leave to refer to paras 17, 18, 19 and 20 of the said affidavit. I am advised and verily believe that all the defendants documents filed and served on the plaintiff's solicitors are valid. The reasons for the above are as follows:

(a) No one until 26 October 1998 had ever suggested that the said documents were not filed and served properly;

(b) The exhibits marked as 'SK 1' and 'SK 2' clearly show that at the material time the plaintiff's solicitors themselves voluntarily accepted the status of Messrs Amin & Associates:

(c) As such the plaintiff is estopped from now saying that the said documents are not valid;

(d) At all material times all the defendants dealt with En Abdul Khalid Shah bin Mohamed Omar who at all material times was in possession of a valid practising certificate; and

(e) I am advised and verily believe that the defendants should not be penalised to the extent that the said defendants are in a worse position than if they had acted on their own for which there are provisions in the Rules of the High Court 1980.

21 I crave leave to refer to para 21 of the said affidavit and the exhibit therein marked as 'SK 6'. I am advised and verily believe that the judgment in default of the defence to the counterclaim is a valid and regularly

obtained one. I am also advised and verily believe that at all material times Encik Abdul Khalid Shah bin Mohamad Omar is in possession of a valid practising certificate. I also verily believe that from 1 October 1998 to 26 October 1998 the plaintiff took no positive steps to protect its interests, if any.

22 I crave leave to refer to para 22 of the said affidavit. I am advised and verily believe that the said search was made on/or after 26 October 1998 when the writ of seizure and sale was executed.

23 I crave leave to refer to para 23 of the said affidavit. The plaintiff had sufficient time from 2 October 1998 when the notice of change of solicitors was served on the plaintiffs' solicitors by Messrs Khalid Shah & Co and before that when the sealed copy of the judgment was served. I am advised and verily believe that it is not proper for the plaintiff to now come and say that it did not have sufficient time to file this application and that too, only after the writ of seizure and sale had been executed on 26 October 1998.

24 I crave leave to refer to para 24 at p 7 of the said affidavit. I am advised and verily believe that the plaintiff is trying to deny the first defendant's benefit from the judgment obtained validly and properly. Further the plaintiff did not take immediate steps to protect its interests, if any.

25 I crave leave to refer to para 24 a, b and c on p 8 of the said affidavit. As I have stated earlier the plaintiff did not make any objections when the service of the documents were effected and is therefore estopped now from saying that they are invalid.

Next, would be the following paragraphs of encl 41:

29 I crave leave to refer to para 25 of the said affidavit. From the very beginning when the memorandum of appearance was served on the plaintiff by Messrs Amin & Associates and duly acknowledged by the plaintiff there was no objection by the plaintiff, even though at the material time the sole proprietor of Messrs Amin & Associates could not act in the capacity of a solicitor, a fact which should have been known to the plaintiff's solicitors. This is clear from the exhibit marked as 'MBS-1'. However, now the plaintiff says that the memorandum of appearance by Messrs Amin & Associates is not valid. The plaintiff also accepted, without objection, the statement of defence and counterclaim by the first defendant. Now the plaintiff alleges that both the said cause papers are not valid and as result the notice of change of solicitors filed by Messrs Khalid Shah & Co and subsequently by Messrs KB Rajah & Co are also invalid. This is not true. I am advised and verily believe that the memorandum of appearance filed, served and acknowledged receipt by plaintiff's solicitors is valid.

30 I crave leave to refer to para 26 of the said affidavit. I reiterate that the plaintiff does not have merit in the defence to counterclaim as stated above in para 27.

31 I crave leave to refer to para 27 of the said affidavit and say that the correct amount for the counterclaim is RM296,850 and not RM296,800 as stated therein. This is due to typing error.

32 I crave leave to refer to para 28 of the said affidavit which is not true as it was the fixed deposit of the first sefendant. I categorically state that the sum was properly credited into the first defendant's account as the

overdraft facility to the company known as Silver Touch Sdn Bhd ('the said company') guaranteed by the first defendant's fixed deposit in the sum of RM1,038,096.85 was verily paid through the fixed deposit accounts of the said company amounting to the sum of about RM2,750,00, assets amounting to RM2,032423.83 and the stock in trade of the said company worth about RM1,000,000 auctioned by the receiver and manager appointed by the plaintiff sometime on/or about 5 August 1996. This was in accordance with the instructions given by the first defendant vide his letter dated 26 July 1996. Now shown to me and marked as exh 'MBS 2' is a copy of the said letter.

This fact was confirmed when after the five loans to the said company in the sums of RM650,000, RM1,350,000, RM1,038,000, RM1,000,000 and RM300,000 including the loan which was guaranteed by me in the sum of RM1,038,096.85 had been utilised and after the receiver and manager had been appointed and all the assets had been realised the solicitors for the plaintiff Messrs Jalil Mohamed & Partners informed me that the outstanding from the accounts in the sum of RM1,350,000 and RM1,000,000 was RM1,609,014.46 as at 5 November 1996. This did not take into account the proceeds from the sale of the assets of the said company by the receiver and manager. No claim was made by the plaintiff against me in respect of the loan given with my personal fixed deposit as guarantee as I verily believe that it was settled. Now shown to me and marked as exh 'MBS 3' are copies of the said letter by the plaintiff's solicitors and the loan accounts. I further state that it was because of the above that the first defendant withdrew the said sum with the consent of the officers of the plaintiff and through fraud as alleged. I further state that when the plaintiff realised that the said company owed the balance on the two accounts aforesaid the plaintiff attempted to claim the said sum through the fixed deposit account of the first defendant and alleged that this sum was wrongly credited into the personal account of the first defendant.

33 I crave leave to refer to para 29 of the said affidavit and state that the banker's cheque was purchased by way of cash. Now shown to me and marked as exh 'MBS 4' is a copy of the said application for the banker's draft. As stated earlier in para 32 there was no fraud. The first defendant withdrew his money with the consent of the plaintiff and as such the plaintiff is estopped from stating otherwise.

34 I crave leave to refer to para 30 of the said affidavit. The contents therein are not true. I am advised and verily believe that the plaintiff wrongfully and fraudulently stopped payment on the banker's cheque.

35 I crave leave to refer to para 31 of the said affidavit. The contents of the same are not true. As I have stated above in para 32 to 34, the banker's cheque belongs to the first defendant. For the reasons stated in paras 32 to 34 the plaintiff does not have any claim against the first defendant for the sum of RM1,038,096.85 as alleged.

36 I crave leave to refer to para 32 of the said affidavit. I am advised and verily believe that the plaintiff does not have any defence to the counterclaim of the first defendant. The plaintiff has not in any event shown any merits in both the applications herein.

All these paragraphs in encl 41 taken cumulatively would put the first defendant in good stead.

In exhibit marked as 'MBS-4' of encl 41, a copy each of the bank draft and the bank slip authorised by the plaintiff's bank showed that payment was made in 'cash'. With 'cash', valuable consideration was given. The banker's cheque purchased by the first defendant was supported by valuable consideration. In para 9 of encl 31, Suhadi bin Khalil who affirmed the affidavit for the plaintiff on 26 October 1998 deposed that the plaintiff's counsel had filed an O 14 application. Yet, the plaintiff had the audacity to allege that the first defendant had perpetrated fraud. Now, if fraud was alleged, an O 14 application should not have been filed by the plaintiff.

Bank drafts or banker's cheques are not considered as cheques or bills because there are no drawers and drawees (*London City and Midland Bank Ltd v Gordon* [1903] AC 240). Bank drafts or banker's cheques are equivalent to promissory notes (*Commercial Banking Co of Sydney Ltd v Mann* [1961] AC 1, PC) and they can be cashed immediately. The banker-customer relationship is one of contract (*Foley v Hill* (1848) 2 HL Cas 28) and it is in the nature of a general contract. There are obligations which come into existence upon the creation of the banker-customer relationship and the bank is obliged to provide these obligations, if asked. On the other hand, there are services which many bankers habitually provide — in fact on a daily basis, such as providing standing orders, direct debits, banker's cheques or popularly known as banker's drafts, letters of credit and foreign currency for travel abroad. The first defendant was entitled to use that banker's cheque as he had paid for it and the plaintiff should not have stopped payment on that banker's cheque. In the first defendant's personal account No 01–013–12728–64, there were other monies there and it would be very difficult to conduct tracing — a point that was not highlighted by either party and I do not propose to dwell on it at length. Suffice for this exercise that I quote the speech of Lord Goff in *Lipkin Gorman v Karpnale Ltd* [1991] 3 WLR 10, particularly at p 27 of the report where his Lordship said:

> At common law, property in money, like other fungibles, is lost as such when it is mixed with other money.

The plaintiff placed great emphasis that Amin had no practising certificate and therefore, so the submission went, no lawful authority to represent or enter cause papers on behalf of the first defendant. It was obvious that at the time the sequence of events unfolded, Messrs Amin & Associates comprised of two solicitors.

(1) Mohd Amin bin Hasbollah, a person without a practising certificate; and

(2) Abdul Khalid Shah bin Mohamed Omar, a person with a practising certificate

Now, according to the first defendant he dealt only with Abdul Khalid Shah bin Mohamed Omar and he gave instructions to the same personality throughout. These averments can be seen in encls 41 and 45 and there were no rebuttals from the plaintiff. The plaintiff must be deemed to have

A accepted these averments: *Abdul Razak bin Ahmad v Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287. What is the position in relation to sole proprietorship? Would the sole proprietorship of a law firm be incapacitated by the absence of a practising certificate of its sole solicitor? The Bar Council cannot determine the capacity or incapacity of a lawyer. The domain lies entirely with the court. Must a member of the public required B to ascertain whether the lawyer has a valid practising certificate before he seeks the services of the lawyer. If that is the requirement it would place an onerous duty on members of the public and it is certainly not the law in our country. Abdul Khalid Shah bin Mohamed Omar had a valid practising certificate at the material time and he was not incapacitated and he can be C considered as a sole proprietor of Messrs Amin & Associates when Mohd Amin bin Hasbollah was without a valid practising certificate. There was no challenge at all that Abdul Khalid Shah bin Mohamed Omar was not incapacitated. An authorised person under the Legal Profession Act 1976 relate to an individual and not to a law firm. It is the advocate and solicitor that is required to apply for a practising certificate and not the law firm . I D did say in *Shahinuddin bin Shariff v Mohd Amin bin Hasbollah* [1998] 3 MLJ 693, at p 699 that: ' ... if one has a practising certificate one is said to be an authorized person and one's name is on the Roll'. Section 35 of the Legal Profession Act 1976 confers on the advocate and solicitor an exclusive right, subject only to the provisions of written law, to appear and plead in all courts of justice. Section 36 of the Legal Profession Act 1976 contains a E general part and it says that no unauthorized person shall practice as an advocate and solicitor or do any act as an advocate and solicitor. Section 37 (1) of the Legal Profession Act 1976 enacts the criminal penalties for an unauthorized person acting as an advocate or solicitor or agent for any party to proceedings or as such advocate, solicitor or agent prosecuting or F defending any action in any court. Section 37(2) of the Legal Profession Act 1976 lists five specific acts which, if done by an unauthorized person for reward, will amount to an offence while s 40 of the same Act bars an unauthorised person from recovering costs and compels him to restore costs that have been received. Reverting back to s 36 of the Legal Profession Act 1976, it enacts that no person shall practise as an advocate and solicitor or G do any act as an advocate and solicitor unless his name is on the roll and he has in force a practising certificate. Thus, an advocate and solicitor who does not have in force a practising certificate is unqualified to practise as an advocate and solicitor (*Re Hodgson & Ross* (1835) 3 Ad & El 224, sub nom *Re Ross & Hodgson* (1835) 4 LJKB 264).

H I will now proceed on some grey areas by posing this pertinent question: What are the effects of proceedings undertaken by unauthorized persons? The cases of *R v Sisk, Sisk v Foley* (1901) 35 NBR 560; *Shaw, Savill & Albion Co Ltd v Timaru Harbour Board* (1888) 6 NZLR 456 gave the view that proceedings undertaken by unauthorized persons would render it void. But the cases like *Bayley v Thompson* (1834) 2 Cr & M 673; *Hill v Mills* I (1834) 2 Dowl 696; *Hilleary v Hungate* (1834) 3 Dowl 56; and *Sparling v Brereton* (1866) LR 2 Eq 64 laid down a sound principle of law to the following effect: such proceedings are voidable at the instance of the client

who cannot be expected to check, ascertain and assure himself that his solicitor was indeed qualified to practise. In my judgment, it appears to be an exercise of over reaction when one says that the proceedings are void especially where the only reason for the lack of authority is the neglect to renew or take out a practising certificate by a duly admitted and enrolled solicitor. It would be voidable if the admitted and enrolled solicitor becomes an unauthorized person merely by virtue of his neglect to take out a practising certificate. The case of *Sparling v Brereton* serves as a good guideline although some semblance of this argument was not taken up before the court there. That was a case where a solicitor had not renewed his certificate and Vice-Chancellor Wood refused to invalidate proceedings begun by the solicitor on behalf of a defendant and his Lordship remarked aptly:

> It would be most mischievous, indeed, if persons, without any power of informing themselves on the subject, should be held liable for the consequences of any irregularity in the qualification of their solicitor.

The void and the voidable effects of proceedings undertaken by unauthorised persons have their own merits. The void effect would secure better protection to the public against incompetent and truly unqualified persons. The voidable effect, on the other hand, would mean that where the result would be unfavourable to the client, and the client may wish to set aside the proceedings but he may find himself estopped from doing so. In the *R v Sisk, Sisk v Foley* (1901) 35 NeBR 560 the court there held that proceedings by an attorney who had not paid the fee required by the consolidated statutes, particularly cl 34, s 4 thereof were said to be void, and the right to set the proceedings aside was not waived by the opposite party contesting the suit to judgment.

The dispute related to the judgment in default of defence obtained by the first defendant against the plaintiff as reflected in encl 26 which was filed by Messrs Khalid Shah & Co on 18 September 1998 although it was dated 29 July 1998. The thrust of the plaintiff's arguments in relation to setting aside of the judgment in default of defence pivoted on two grounds:

(1) when the judgment in default although dated 29 July 1998 was entered on 18 September 1998 and there was thus no authority conferred on Messrs Khalid Shah & Company to enter the judgment in default as they were the solicitors on record only on 23 September 1998 based on the notice of change of solicitors as seen in encl 24a.

(2) The effective date of the judgment in default would be the date when the praecipe was paid and judgment entered on 18 September 1998, but, on 29 July 1998 a judgment in default was filed and it was duly certified and approved by the SAR as reflected in encl 26A.

For convenience, these two grounds will now be considered separately.

First ground

In regard to the lack of authority of Messrs Khalid Shah & Co to enter the judgment in default, the case of *Yukilon Manufacturing Sdn Bhd & Anor v*

Dato' Wong Gek Meng & Ors (No 2) [1998] 5 MLJ 1 was cited and it was submitted that that case was rightly decided on its facts. That was a case where PM Mahalingam, an advocate and solicitor, threw the RHC to the wind. Here, the facts were entirely distinguishable. There was a notice of change of solicitors dated 23 September 1998 as seen in encl 24a and a perusal of that enclosure showed that it was filed and praecipe paid and duly attested by the High Court Registry on 16 September 1998. This meant that when the judgment in default was entered on 18 Septembe 1998, Messrs Khalid Shah & Co was already on record, two days earlier, as the solicitors for the first defendant. The hand written notation on the top right hand side of encl 24a — the notice of change of solicitors filed by Messrs Khalid Shah & Co, bore the following words:

> Resit No A 147758
> bertarikh 16 September 1998
> RM8
>
> (Sgd)
> Illegible

and it was submitted, rightly so, that the handwritten notation was made because of the breakdown of the computer. I take judicial notice of the frequency of power failures in the Johor Bahru High Courts. The scope and latitude of judicial notice extend far and wide. It is not closed. When a court takes judicial notice of a fact it simply means that the court declares that it will find that the fact exists. Lord Sumner in *Commonwealth Shipping Representative v P & O Branch Service* [1923] AC 191 at p 212 aptly said, in fine style, the following:

> Judicial notice refers to facts which a judge can be called upon to receive and to act upon either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer.

The list of cases where the courts have taken judicial notice of facts without inquiry are endless and examples of them can readily be found in the law books. I will now endeavour to cite a few examples:

(1) No evidence is required to show that a fortnight is too short a period for human gestation (*R v Luffe* (1807) 8 East 193).

(2) That the University of Oxford exists for the advancement of learning (*Re Oxford Poor Rate Case* (1857) 8 E & B 184).

(3) That cats are normally kept as domestic animals (*Nye v Niblett* [1918] 1 KB 23).

(4) That young boys have playful habits and tendencies (*Clayton v Hardwicke Colliery Co Ltd* (1915) 85 LJKB 292).

(5) That criminals have an unusually unhappy lives (*Burns v Edman* [1970] 2 QB 541, [1970] 1 All ER 886).

(6) A post card sent through the mail will be read by everyone and by anyone (*Huth v Huth* [1915] 3 KB 32).

(7) That husbands will read their wives' letters (*Theaker v Richardson* [1962] 1 All ER 229, [1962] 1 WLR 151). A

Now, applying my general knowledge of the courts in Johor Bahru, handwritten notations would be done by the relevant officers when electricity supplies were not available. This was what had happened to encl 24a . Power shortages in the Johor Bahru High Courts are quite common and it happened with alarming frequency. Be that as it may, on 18 September 1998 Messrs Khalid Shah & Co had the relevant authority to enter the judgment in default of defence as seen in encl 26. It is germane to emphasise that Abdul Khalid Shah bin Mohamed Omar, as an advocate and solicitor, dealt with the matter for the first defendant right from the very beginning when he was with Messrs Amin & Associates and this continued until he set up his own law firm. In the course of writing this judgment, I came across a letter from the Bar Council, Malaysia dated 3 December 1998 marked as encl 63 in the court file. That letter interestingly showed that Messrs Khalid Shah & Co had been registered with the Bar Council on 17 August 1998 while the approval letter was sent to him — meaning to Abdul Khalid Shah bin Mohamed Omar, on 19 August 1998. The need to register with the Bar Council is amply set out in s 85 of the Legal Profession Act 1976 which reads as follows: B C D

(1) The Bar Council shall maintain a register of firm names under which advocates and solicitors practise. No firm name shall be registered or struck off the register without a certificate from the Bar Council. The Bar Council may refuse a certificate for registration on the grounds that the proposed firm name is likely to be confused with a registered firm name or is likely to mislead the public. An advocate and solicitor who is dissatisfied with a decision of the Bar Council may appeal to the High Court whose decision shall be final. E F

(2) No person shall practise as an advocate and solicitor under a name that is not —

(a) his own name;

(b) the names of advocates and solicitors who are [or were] his partners;

(c) the names of his predecessors whose goodwill he has, or his partners have, acquired; G

(d) any one or the combination of the names specified in paras (a), (b) and (c).

(3) In any case where a name which complies with sub-s (2) cannot be registered without contravening sub-s (1) then the person may practise under such name as he wishes which is approved by the Bar Council. H

(4) An advocate and solicitor who acts in contravention of sub-s (3) may be liable to disciplinary proceedings.

(5) The Bar Council shall, at the request of the partners practising under a firm name, and may, if it is satisfied that no one is practising under that name, remove a firm name from the register. I

For convenience, that letter from the Bar Council should be reproduced and it was worded as follows:

Majlis Petguam
Bar Council
Malaysia

Bil Kami: BC/A/750

3 December 1998

Messrs Chor Pee Anwarul & Co
Advocates & Solicitors
Unit 10.01, Level 10
Wisma LKN
49, Jalan Wong Ah Fook
80000 Johor Bahru

Dear Sir,

Re: Messrs Khalid Shah & Co

The above matter and your letter dated 27 November 1998 refer.

Please be informed that after reviewing our records, we find that the firm Messrs Khalid Shah & Co has been registered with the Bar Council on 17 August 1998. However, the approval letter was sent to him on 19 August 1998. Due to an inadvertent error, I informed you on 15 October 1998 that the said firm was registered with the Bar Council on 19 September 1998 and I apologize for any inconveniences caused.

Please be informed that all law firms shall be registered with the Bar Council pursuant to s 85(1) of the Legal Profession Act 1976 and no advocate and solicitor shall practise under any name which is not registered/approved by the Bar Council.

Thank you

Yours faithfully

Sgd
Nor Azmar Hanim bte Mokhtar
Executive Officer

RECEIVED 9 DECEMBER 1998

and the sting of that letter can simply be put in this way: that Messrs Khalid Shah & Co was registered with the Bar Council even before that law firm entered the judgment in default of defence on behalf of the first defendant as reflected in encl 26.

Second ground

The case of *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312 emphasized that a fair copy of the judgment should be presented for entry in compliance with all the requirements of the RHC. The case also laid down the principle that a draft judgment was not a judgment since a draft implied that it needed perfection and approval. But that case did not consider the issue of whether there was a necessity for a party to apply for extension of time after pleading had closed. An extension of time was an issue to be determined by this court and, in my judgment, the plaintiff in filing the defence to the counterclaim did so out of time and there was no formal application to enlarge or abridge

time. It would be pointless to allude to the case of *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* when this court was confronted with the failure of the plaintiff to obtain leave before filing the defence to the counterclaim.

Now, assuming for one moment that Abdul Khalid Shah bin Mohamed Omar had no authority to act for the first defendant, which was not the case here, what would be legal effect of setting aside the judgment in default of defence? The answer can be garnered from the case of *Richards v Bostock* (1914) 31 TLR 70 which laid down this principle of law: proceedings were not invalidated between one litigant and the opposite party merely by reason of the litigant's solicitor being unqualified, for example by his failure to obtain a proper practising certificate in force.

The fact that the solicitor is without a practising certificate, it should not jeopardise the position of the litigant. Litigants are ordinary citizens who seek redress in courts of law and are not concerned with the legal technicalities that affect the status of their solicitors.

For the reasons adumbrated above, I allowed encl 48 with costs.

Appeal allowed with costs.

Reported by Moy Saw Han